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No. 87-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DELTA AIR LINES, INC.,

Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
RULE 28.1 LISTING	i
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. This Case Involves An Important Issue Of Federal Law	1
II. The Decision Below Is In Conflict With Prior Decisions	4
CONCLUSION	6
APPENDIX	1a

TABLE OF AUTHORITIES

	Page
City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982)	5-6
Griggs v. Allegheny County, 369 U.S. 84 (1962)	5
Pacific Southwest Airlines v. County of Orange, No. CV 81-3248 (C.D. Cal. injunction granted Nov. 30, 1981)	6
San Diego Unified Port District v. Gianturco, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982)	4-5
Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981)	5
Texas Air-Eastern Acquisition Case, Order 86-7-21 (Dep't of Transp. July 9, 1986), *aff'd*, Order 86-8-77 (Dept. of Transp. Aug. 26, 1986)	2
STATUTES:	
49 U.S.C. app. § 1305	*passim*
49 U.S.C. app. § 2210	3
REGULATION:	
14 C.F.R. § 399.110(f) (1987)	4
OTHER AUTHORITIES:	
Ellett, *Airport Access Issues*, The Air & Space Lawyer, Summer 1987	1-2

ARGUMENT

I. This Case Involves An Important Issue Of Federal Law.

In characterizing this case as simply involving a "narrow issue of statutory interpretation" regarding whether a multi-airport proprietor "has the authority to enact a reasonable, nondiscriminatory perimeter rule" (Opp. Br. 7, 17), the Port Authority seeks to obfuscate the importance of the questions presented. In sharp contrast, the chief legal officer of the FAA has stated that the matter of airport access is "the most important issue facing aviation in this country and will remain so for at least the next twenty years."[1]

This "most important" issue is now before this Court in this case. In discussing the decision below, the FAA's Chief Counsel has said:

> We are not willing to concede that the current law can be reconciled with a holding that a perimeter rule, which is essentially an airspace regulation, even in the context of a multi-airport system, is not preempted by the federal government. *We cannot condone or accept restrictions which, even if reasonable and non-discriminatory, go beyond proprietors' lawful rights and enter the clearly federal domain of regulation of the airspace or*

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[1] Ellett, *Airport Access Issues*, The Air & Space Lawyer, Summer 1987, at 1, reprinted in the appendix. The brief in opposition does not even acknowledge these views of the FAA, although they were discussed in the previous *amicus curiae* brief filed by the Air Transport Association of America.

> *regulation of a carriers' routes, rates, or services.*

Ellett, *supra* n.1, at 19 (App. 8a) (emphasis added).

Without doubt, the perimeter rule directly interferes with this federal domain. It bars Delta from flying non-stop between Salt Lake City and LaGuardia[2] and it denies passengers non-stop service.[3] It is a locally imposed restriction that extraterritorially governs airline operations nationwide.

The Port Authority argues that its authority to impose a perimeter rule is supported by various cases allowing airport proprietors to impose takeoff noise limits and to establish other rules designed to combat noise and congestion. This misses the point. No one disputes that controlling airport congestion is a legitimate goal for an airport proprietor that may be

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[2] The LaGuardia Airport perimeter rule has a dramatic effect on airline competition for long-distance traffic into and out of the New York area. As recognized in regulatory decisions, a substantial portion of air travelers show a significant preference for LaGuardia Airport. *Texas Air-Eastern Acquisition Case*, Order 86-7-21, at 13-14 (Dep't of Transp. July 9, 1986), *aff'd*, Order 86-8-77 (Dep't of Transp. Aug. 26, 1986). Thus, to serve effectively all of the New York area, service at Kennedy, Newark, and LaGuardia is required.

[3] Remarkably, the Port Authority argues that its perimeter rule "merely 'gives travelers a choice' of which airport they may wish to travel through." (Opp. Br. 14). A *restriction* on flight availability can hardly be regarded as "giving travelers a choice." Absent such a restriction—that is, given a choice—there can be no doubt what travelers would choose. Else why impose the rule?

achieved by a broad range of measures.[4] What section 105 proscribes—and the decision below unprecedentedly condones—is a proprietor's using that goal to justify dictating what routes airlines may fly, what rates they may charge, or what services they may provide.[5]

The Port Authority concedes that section 105 was designed to prevent local governments from replacing the former CAB's economic regulations of air carriers with their own (Opp. Br. at 12-13 & n.10). Yet this is precisely what the Port Authority seeks to do. In dictating what non-stop routes airlines may fly, the perimeter rule duplicates the type of regulation formerly imposed by the CAB. As a route limitation, it is thus no different than the rate and service limitations that the Port Authority concedes are preempted (Opp. Br. 15 n.12).

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[4] Contrary to the brief in opposition, Delta does not agree that the LaGuardia Airport perimeter rule is reasonable. The question presented, however, is whether a local government may enact a perimeter rule with extraterritorial effect, not the "reasonableness" of the specific rule imposed at LaGuardia Airport.

[5] Similarly unavailing is the Port Authority's reference to a 1980 House Committee report on an appropriations bill, never enacted, which suggested that an airport proprietor could deny an airline access to one airport if it affords access to another airport at the same hub (Opp. Br. 8 n.6). The conditions under which airlines may be denied access to an airport altogether are governed by 49 U.S.C. app. § 2210, which allows denials of access provided that airlines are treated in a nondiscriminatory and reasonable manner. Section 2210, of course, does not purport to override section 105's prohibitions by allowing a proprietor to condition access to an airport on the basis of an airline's rates, routes, or services.

Section 105 expressly provides that its prohibition on renewed regulation of rates, routes, and services "shall not be construed to limit" exercises of local governmental "proprietary powers" (which may incidentally affect airline service). Nothing in section 105, however, allows local governments to expand their proprietary powers to encompass the rate and route regulation previously exercised by the CAB.[6] By upholding the extraterritorial perimeter rule on the basis of serving some legitimate local goal, the decision below for the first time allows local governments to impose a wide range of rate, route, and service regulations on an industry that Congress sought to deregulate.

II. The Decision Below Is In Conflict With Prior Decisions.

The Port Authority's attempt to dispel the conflict between the decision below and prior decisions is also without merit. The brief in opposition does not explain how the decision below can be reconciled with the Ninth Circuit's holding in *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). The court there held that the "proprietary powers" exception is con-

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[6] Thus, the Department of Transportation's regulation concerning federal preemption permits local governments to exercise their proprietary powers only "when such exercise is reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed to accomplish a legitimate State objective *in a manner that does not conflict with the provisions and policies of the* [*Airline Deregulation*] *Act*." 14 C.F.R. § 399.110(f) (1987) (emphasis added).

gruent with an airport operator's exposure to liability:

> The rationale for [the proprietor] exception is clear. Since airport proprietors bear monetary liability for excessive aircraft noise under *Griggs v. Allegheny County*, 369 U.S. 84 (1962), fairness dictates that they must also have power to insulate themselves from that liability. But before an entity may possess this power, it must bear the responsibility, either actual or potential, for excessive aircraft noise.

651 F.2d at 1316-17 (footnotes omitted). The Port Authority makes no argument that it could be liable for allowing long-distance non-stop flights into La-Guardia. Instead, it seeks to dismiss the above language as *dictum* and argues that the Ninth Circuit's earlier decision in *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981), envisions a broader application of the proprietary powers exception than the scope of *Griggs* liability. In fact, while the *Santa Monica* decision is less definite than that in *San Diego*[7] the thrust of the *Santa Monica* opinion is that the possibility of municipal liability requires that a proprietary power exception be adopted. 659 F.2d at 103, 104 n.5.

The Port Authority is also incorrect in its contention that the decision below is supported by the Fifth Circuit's opinion in *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). In rejecting a section 105 challenge to the FAA's perimeter rule for National Air-

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[7] Thus, *Santa Monica* stated: "The [proprietary powers] caveat *may have been* thought necessary in view of the Court's earlier decision in *Griggs* . . . ." 659 F.2d at 103 (emphasis added).

port in that case, the Fifth Circuit took pains to distinguish the FAA from local government proprietors: "Nothing could be more certain than that the restrictions of § 1305 do not bind the FAA, an arm of the federal government which just happens to own two airports." *Id.* at 1194. Similarly, the argument of the Port Authority (Opp. Br. 11) that the FAA's proprietary interest is the same as the Port Authority's is incorrect and misleading. In *City of Houston*, after noting that "the FAA is not the typical airport proprietor," *id.*, the court actually held that cases reciting the "extremely limited" regulatory role of local airport proprietors did not limit the FAA:

> Petitioners again miss the key question, that is, whether the FAA is governed by the same rules as a local proprietor. The answer, obviously, is no.

679 F.2d at 1194.

Thus, *City of Houston* did not uphold the National Airport perimeter rule based on the proprietary powers of *local governments*. Indeed, the only prior federal court decision regarding a locally imposed perimeter rule of which petitioner is aware is *Pacific Southwest Airlines v. County of Orange*, No. CV 81-3248 (C.D. Cal. Nov. 30, 1981) (discussed in *City of Houston*, 679 F.2d at 1194), in which the district court, acting pursuant to section 105, enjoined a 500 mile perimeter rule at John Wayne Airport in Orange County, California.

CONCLUSION

The issue presented by this case vitally affects the airline industry, airports throughout the nation, and potentially millions of air travelers. The decision be-

low resolves that issue in a manner that negates the mandate of Congress to deregulate and conflicts with the decisions of other circuits. As indicated by the comments of the FAA's counsel, this case presents a unique opportunity for the Court to resolve the issue. The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

AIRPORT ACCESS ISSUES

[From *The Air & Space Lawyer*, Summer 1987, at 1.]

By E. Tazewell Ellett*

Editor's Note: *These are the remarks given by E. Tazewell Ellett on Thursday, October 16, 1986, at the ABA Forum Committee on Air and Space Law Fourth Annual Forum. Obviously some events and stated facts may be different now.*

The topic "Airport Access Issues" is in my view the most important issue facing aviation in this country and will remain so for at least the next twenty years. All of you are or will be affected in one way or another by airport access and airport noise issues, either as counsel representing one side or another in an airport access dispute or simply as a private citizen forced to put up with aircraft noise or with the inconvenience of traveling in an extremely burdened national air transportation system. Now I will briefly outline the federal government's role in these issues and give you some insight into recent and particularly thorny situations involving airport access that have been consuming a great deal of my time and the time of many on my legal staff.

The starting point for federal involvement in airport access and noise issues is, of course, statutory. The FAA, as part of the Department of Transportation, has a dual statutory mandate. We are charged with both fostering a vital national system of airports and airways, and controlling, to the extent practicable, the negative effects of aircraft noise on the public. This dual responsibility of the FAA is extremely important because it places on the FAA a legal obligation on both sides of airport access and air-

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port noise disputes. Both these mandates, of course, must be viewed within the context of our plenary authority and primary duty to safely and efficiently control the use of the nation's airspace. All of our efforts toward developing the national air transportation system or protecting the environment must complement our duty to control the airspace.

The mandate that the FAA create and maintain a vital and efficient air commerce system is not new. This focus has been present since the beginning of the federal government's involvement in civil aviation. The promotion and fostering of aviation and of a system of national airports and airways was the major emphasis of the Air Commerce Act of 1926[1] and the Federal Airport Act of 1946.[2] The Federal Aviation Act of 1958,[3] while primarily addressing the need for a stronger safety emphasis, continues to focus on development of the system and requires the administrator to "encourage and foster the development of civil aeronautics and air commerce in the United States and abroad."

The strongest statement of this mandate is more recent. The Federal Aviation Act was amended in 1978 by the Airline Deregulation Act of 1978.[4] Now, by virtue of these amendments, the FAA must consider the following goals as being in the public interest:

- the availability of a variety of adequate, economic, efficient, and low-price services by air carriers;
- the placement of maximum reliance on competitive market forces;

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[1] 44 Stat. 568 (1926).

[2] 49 U.S.C. § 1101, *et seq.*

[3] 49 U.S.C. § 1301, *et seq.*

[4] 49 U.S.C. §§ 1301, 1302, 1305 to 1308. 1371-1374, 1376, 1378, 1379, 1382, 1384, 1386, 1389, 1461, 1471, 1482, 1490, 1504, 1551, 1711, 1729, 1743.

- the development and maintenance of a sound regulatory environment which is responsive to the needs of the public and in which decisions are reached promptly in order to facilitate adaptation of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States;
- the encouragement of air service at major urban areas in the United States through secondary or satellite airports;
- the maintenance of a comprehensive and convenient system of continuous scheduled interstate and overseas airline service for small communities;
- the encouragement of entry into markets by new air carriers; and
- the regulation of air commerce in such a manner as to best promote its development.

Likewise, the Airport and Airway Improvement Act of 1982[5] requires that this agency continue airport and airway improvement programs and develop more effective management and utilization of the nation's existing airports in order to meet the increasing demands resulting from the projected growth of aviation.

The other aspect of our dual statutory charge is found in section 611[6] of the Federal Aviation Act, the Aviation Safety and Noise Abatement Act of 1979 (ASNA),[7] and the National Environmental Policy Act (NEPA).[8] Pursuant to each of these authorities, the FAA acts to protect the public health and welfare from the impacts of aircraft noise.

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[5] 49 U.S.C. 2201, *et seq.*

[6] 49 U.S.C. 1431.

[7] 49 U.S.C. 2101, *et seq.*

[8] 42 U.S.C. 4321, *et seq.*

Under ASNA, we are authorized to fund airport noise compatibility studies and to approve our [sic] disapprove any noise compatibility programs developed by airport proprietors as a result of those studies. To implement this responsibility, we promulgated part 150 of the Federal Aviation Regulations.[9] Pursuant to ASNA and part 150, we approve noise compatibility programs submitted by airport proprietors so long as the measures proposed are reasonable, nondiscriminatory, do not unduly burden interstate or foreign commerce and are reasonably consistent with the goal of reducing existing noncompatible uses and preventing the introduction of additional noncompatible uses.

These two FAA responsibilities do, of course, conflict with one another, but, in fact, it is entirely appropriate that only one entity have that dual responsibility and that the federal government be that one entity.

Consider these FAA responsibilities in light of the following predictions. Industry and government projections show that there will be a forty percent increase in air carrier hours flown per year between now and the year 2000. In general aviation, there are predictions of a fifty percent increase in hours flown annually. Predictions are that air carrier enplanements will increase by eighty percent and commuter enplanements by 178 percent between now and the year 2000. The air carrier and commuter fleets are predicted to grow by fifty-seven and seventy-one percent, respectively.

We now have in this country 3,219 airports which handle our current commercial and general aviation activity. To keep up with the demand we forecast, 3,750 airports would be needed by the year 2000. That is an increase of 531 airports in only thirteen years. Because an increase of that magnitude in the number of airports by the year 2000 is

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[9] 14 C.F.R. 150.

highly unlikely, this country simply will need to have increased capacity at existing airports if we are going to avoid a complete gridlock in the national air transportation system.

Our duty to foster aviation compels us to seek ways to accommodate this increasing demand for airport capacity. Simultaneously as we look for additional funds and technical improvements to increase airport capacity, we are being met with a rapidly swelling tide of restrictions on airport access imposed by airport proprietors because of pressures caused by aircraft noise. These noise-based restrictions on airport access are reducing capacity at airports from one end of the country to the other. Here our other statutory duty comes into play, the duty to mitigate the negative environmental impacts of aircraft noise. The FAA works very hard to address aircraft noise problems. Over the last five years we have provided over $332.4 million in grants for noise mitigation or land use compatibility purposes. We also work very closely with airports and their users to determine reasonable solutions to aircraft noise problems. In that regard, we seek solutions which are fair to all involved, not just those with the most local political clout.

We are extremely concerned about the quickly growing number of airports which have in place or have in the planning stages restrictions on access which prevent those airports from being operated to full capacity. The pressure on airport proprietors to restrict traffic growth for reasons of noise is increasing, and comes from a number of directions: from the airport proprietor's need to limit it exposure to noise related damages in litigation; from community groups desiring to reduce aircraft noise in the community or to retain the residential character of the community by preventing the business and industrial growth which can compatibly accompany airport commercialization; or even from "city hall," in cases where the

airport proprietor is an arm of "city hall" and is forced to implement restrictions, albeit reluctantly.

The FAA has no agenda to deter local governments and communities from accomplishing legitimate local goals. But we do have the responsibility to ensure that the national system of airports and airways is not burdened by unjustified local restrictions. When faced with a proposed noise-based restriction on aircraft operations, we like to see the following things: (1) we want documentation of the nature and extent of the problem airport proprietors are seeking to address through the proposed restriction; (2) we want to see that the restriction has been developed or selected in a reasonable manner, with adequate opportunity for outside input, including that of the FAA; (3) we want to know that the constraints being proposed are of such a benefit to the problem presented that any burdens on commerce resulting from their imposition are reasonable; and finally, (4) we want to be shown that there are no less restrictive options available which could resolve the problem.

We do not oppose restrictions which reasonably and without discrimination accomplish real environmental benefits without encroaching on a federally preempted area or unduly burdening the national system. We understand the need of the airport proprietor to balance sometimes competing interests in the same manner the federal government must often do so. Under current and longstanding legal authority, the airport proprietor has the legal exposure in noise-related damage actions. It has been clear since the 1962 U.S. Supreme Court decision in *Griggs v. Allegheny County*,[10] that, because the airport proprietor selects the location of the airport and has the responsibility to purchase adequate land around the airport to ensure that aircraft noise does not become a nuisance, the airport

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[10] 369 U.S. 84 (1962).

proprietor thus is responsible when aircraft noise does become a nuisance.

This exposure naturally brought with it some authority to minimize the liability. The U.S. Supreme Court in *City of Burbank v. Lockheed Air Terminal, Inc.*,[11] pointed out in the now famous footnote 14 that a state or local government, as proprietor of an airport, does have some authority to set noise limits at its own airport. The real holding of the case, however, was that Congress, through the Federal Aviation Act and the Noise Control Act of 1972, had preempted non-airport proprietor control over aircraft noise. Nothing in this case even hints at an extension of airport proprietors' rights into an area outside that of controlling aircraft noise.

The extent of these airport proprietors' rights has to this day not been clearly defined. In the 1976 case of *National Aviation v. City of Hayward*,[12] the United States District Court for the Northern District of California upheld a municipal ordinance denying the use of that city's air terminal to aircraft which exceeded a specified noise level. The court in *Hayward* utilized a balancing test and found that so long as the statute regulated ". . . evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental . . .," it was a legitimate exercise of the city's proprietary authority.

In the cases of *British Airways Board v. Port Authority of New York and New Jersey*, better known as Concorde I[13] and Concorde II,[14] the Second Circuit in 1977 outlined some fairly clear boundaries on proprietors' rights. The court held that an airport proprietor is ". . . vested only

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[11] 411 U.S. 624 (1973).

[12] 418 F.Supp. 417 (N.D. Cal. 1976).

[13] 558 F.2d 75 (2d Cir. 1977).

[14] 564 F.2d 1002 (2d Cir. 1977).

with the power to promulgate reasonable, non-arbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs. Any other conduct by an airport proprietor would frustrate the statutory scheme and unconstitutionally burden the commerce Congress sought to foster."[15]

In a much more recent case, *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*,[16] the United States District Court for the Southern District of New York found that a perimeter rule at LaGuardia Airport which prohibits airlines from operating flights beyond 1,500 miles was a reasonable airport proprietor action. The court dismissed Western's claim that proprietors' rights extend only to the regulation of noise and found that the management of congestion problems, through imposition of a perimeter rule, is a valid exercise of proprietors' rights when done by the proprietor of a multi-airport system.

We in the FAA are concerned about this decision. We are not willing to concede that the current law can be reconciled with a holding that a perimeter rule, which is essentially an airspace regulation, even in the context of a multi-airport system, is not preempted by the federal government. We cannot condone or accept restrictions which, even if reasonable and non-discriminatory, go beyond proprietors' lawful rights and enter the clearly federal domain of regulation of the airspace or regulation of a carriers' routes, rates, or services.

This perimeter rule decision, like an earlier case which upheld a takeoff fee imposed on small aircraft during peak periods of commercial traffic, simply underscores the fact that the scope of proprietors' rights is not yet clearly defined or limited. A gradual broadening of these rights

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[15] 558 F.2d at 84.

[16] No. 86 Civ. 6259, slip op. (September 3, 1986).

might well severely burden the national air transportation system.

We are becoming increasingly concerned about burgeoning noise-based restrictions on aircraft operations, and therefore are increasingly seeking from airport proprietors information supporting the restrictions so that we can balance their benefits against their burdens. We are concerned that certain airport proprietors are not adequately considering the burden of their proposed restrictions on the national air transportation system. This is not surprising since airport proprietors do not have the responsibility to protect the national system (only the FAA has that) and since proprietors generally do not have access to information on the impacts of local restrictions on the national system.

Another reason why we are becoming, of necessity, increasingly active in opposing what we believe to be illegal, unjustified, or unreasonable restrictions on aircraft operations is that developing case law has limited the ability of private parties, including the air carriers and other airport users, to bring a cause of action claiming that airport proprietor-imposed restrictions are illegal.

In the case of *Montauk-Caribbean Airways, Inc., dba Long Island Airways v. Judith Hope, et al.*,[17] the Second Circuit Court of Appeals, earlier this year, held that the airline complainant, which desired more generous lease terms, had no right to bring an action to enforce the federal preemption and exclusive rights provisions of the Federal Aviation Act or the unjust discrimination and exclusive rights prohibition provisions of the Airport and Airway Improvement Act. The airline's claims that an exclusive right had been granted a competitor, that it was being discriminated against, and that the airport owner was illegally regulating routes, rates, and services of a

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[17] 784 F.2d 91 (2d Cir. 1986).

carrier were held to be claims that could only be raised by the federal government.

In another case on this subject, *New York Airlines, Inc. v. Dukes County, Martha's Vineyard Airport Commission, et al.*,[18] the United States District Court for the District of Massachusetts held that the carrier had no private right of action under the Federal Aviation Act, but that the carrier did have a right to claim a violation of the Constitution's Supremacy Clause and to claim discrimination and the granting of an illegal exclusive right under the Airport and Airway Improvement Act. Despite this case, which has not been followed elsewhere, it appears that the options for carriers or other airport users are becoming limited, and that the federal government must act if the viability of the system is to be protected when unjustified and unjustifiable constraints are imposed.

Given our statutory responsibilities and the increasing activity of airports in this area, it is not surprising that the FAA now is actively involved in several access restriction disputes around the country. Here are a few:

- In Long Beach, California, we have supported the carriers' action in court to effect an immediate increase in commercial operations at Long Beach Airport because of data indicating additional flights can be accommodated without an adverse environmental effect.
- In San Francisco, we have issued a notice of proposed cease and desist order to the city because of its refusal to allow hush-kitted Boeing 707 aircraft to operate at San Francisco Airport. We have taken this step because we believe the city's refusal to admit those aircraft is unjustly discriminatory and violates federal law and the city's own ordinance on the subject, which allows stage 2 aircraft like

[18] No. 85-2342-W, slip op. (December 4, 1985).

the B-707 to operate at the airport. An administrative proceeding now is underway on this issue.

- In Denver, we are trying to obtain information from the city to determine if there is justification for restrictions the city wants to place on operations on proposed new runways and at the proposed new airport. The city has signed an agreement with a neighboring county which, if implemented, will likely place the city in the status of violating federal law and the promises made by the city in its airport grant contract with the FAA.
- In Minneapolis, we are seeking to have a recently imposed ban on all training operations repealed or modified as an unlawful intrusion into the federally preempted area of regulation of airspace.

Despite these present and possible future confrontations, it would be a mistake to assume that the FAA and the nation's airports are always in a confrontational posture. This is certainly the exception rather than the rule.

In many communities across the country, we fund and participate in the part 150 study process, which helps local officials and citizens resolve airport noise problems effectively without infringing on the vitality of the national air transportation system.

Our role is to ensure that airport operators and local communities find the correct mixture of environmental controls and open access to their airports. Whether we play this role in the context of a part 150 study, in litigation, or in some less formal involvement, we will be there, looking for the best solution to both the noise problem and the problem of increasing demand amidst extremely scarce capacity.

In closing, I would like to note that the FAA and the Department of Transportation currently are considering whether there is better way to manage both of these FAA

roles. As you probably know, in January of this year, we published a notice of proposed policy covering airport access and capacity issues. We held a series of public hearings on those issues across the country, and we now are in the process of finalizing the course we want to take on these issues in the future. Although it is not yet certain in which direction we will move, we will be attempting to ensure that the legal framework in which we operate provides fairness to airports and airport users alike and that decisions in this area consistently reflect the appropriate balance between the interests of the national air transportation system and local community interests. Whether this will mean new legislation, additional regulations, additional policy statements, or other action, we do not know as of yet, but regardless of the means, the goal will be to create a system for addressing these issues which is clearer, more predictable, and more useful to all concerned.